

Law in capitalism

An interview with Katharina Pistor

Thomas Dollmaier

2019-10-28T13:36:52

Katharina Pistor is the Edwin B. Parker Professor of Comparative Law at Columbia Law School, New York, and Director of the Law School's Center on Global Legal Transformation. After delivering the opening keynote address at the [4th annual LDRN conference](#) at Humboldt University Berlin, Thomas Dollmaier sat down with her to discuss the constitutive role of law in the global capitalist system, the relationship between law and power, and the challenges and opportunities of comparative and interdisciplinary research.

In your recent book [The Code of Capital: How Law Creates Wealth and Inequality](#) you show how law serves capital and fulfils the interests of the elites rather than the rest. Do you think the Crits [critical legal scholars] and the legal realists are surprised by your findings?

I think they are not surprised. The realists discovered how legal institutions work and operate in conjunction with power. My issue with some of the Crits in the later generation is that the discussion of power dominated to an extent that they neglected to go into the details of the legal institutions. Law is a particular institutionalization of the coercive power of the state, but who can avail themselves of that power is something that we should investigate. The law is actually quite malleable. State power doesn't back a particular group of elites, but elites can avail themselves of the law. I think that's a dimension I add to the debate that might not have been quite as explicit before. I am not reinventing the wheel, but I bring realists into the 21st century, I go into greater detail, and I try to explain to economists and lawyers in the tradition of Law and Economics how important it is to really understand the details of the law.

Can you flesh out how public and private power interrelate? Isn't it the state that ultimately decides who can avail themselves of its power?

It depends. We have spun the system in a direction in which the state has less and less control, even though private power ultimately depends on the coercive powers of the state. Of course, we can have transactions between you and me without using the law, without using state courts, and we can enforce it. But that is not scalable. If we want scaled systems, such as anonymous markets, and expand the scope of property rights, we need to rely on the expectation that these claims can be enforced in a court of law. This is critical for scaling. Our system of capitalism on the national and global level has reached a scale and a level of complexity that cannot be sustained by mutual monitoring, trust, reciprocity, and self-governance; this is where state power, configured as private law that is readily available for private actors, comes in. The state plays quite a passive role in this scenario. State courts

were important in the early period and strategic private actors found out how they could use state courts to achieve what they wanted to do. Over the last 20 or 30 years, especially with the globalisation of legal transactions and financial assets, however, attorneys have become much more careful in invoking courts – especially common law courts – because a single precedent could destroy the web of private contracts that spans the globe and that they have created in the expectation that it is legal. They still go to court but often settle privately before a final ruling that they cannot control, or they use arbitration. Arbitral awards are, of course, enforceable by state courts under the *New York Convention [on the Recognition and Enforcement of Foreign Arbitral Awards]*. By using arbitration, state power is configured not for dispute settlement, but for the execution of awards private arbiters have granted.

This creates an odd situation in which we are moving away from legislatures or courts as a source of law. In legal opinions that law firms write for new innovative products, they cite cases that are sometimes ten years old. As fewer cases make it to courts, we lose proximity to legitimate legal authorities. If some strategic actor in the future challenges this system, the house of cards may well collapse.

How much agency do different kinds of states have to regain some of their legal sovereignty?

Different countries have different agencies. Some are rule-makers, others are rule-takers. The rule-takers are countries that have accepted foreign law and allow private actors to opt out of their legal system, their courts will enforce it, and they are parties to Bilateral Investment Treaties (BITs). These states don't have full legal sovereignty. If they are democracies, they are democracies with limited self-governance because a lot of critical rules for doing business on their territory are determined by a different country. Taking that back is complicated. You can, of course, change some critical rules, but you will also lose a lot of economic benefit and you don't know what the repercussions will be. How much choice countries have, depends on how deeply interdependent they are with the system, and how willing they are to accept short to medium term losses in order to regain their legal and state sovereignty.

To regain legal sovereignty, there must be limits to the choice-of-law rules, such as the 'incorporation theory' for corporate law. We may want to have relatively flexible private law, but we also must assure that there are limits to opt outs and regulatory arbitrage.

Does the analysis you provide in your book also apply to capitalist systems that are different from U.S. financial capitalism, e.g. Germany's social market economy?

I argue in my book that anglophone practices of coding capital have diffused into many legal systems, including Germany's – in part with active participation of the German government and the legislature. For example, along with other member states of the E.U., Germany changed its bankruptcy rules to grant derivatives and repos bankruptcy safe harbors. I also show data in the book about the dominance of Anglo-Saxon law firms in legal practice regarding mergers and acquisitions and

capital market law. Another part of the diffusion story is U.S. legal education which students acquire through LL.M.s in the U.S. and which they bring back into legal practice in their home countries. I believe that there is still much left of the social market economy in Germany, but it has certainly been curtailed over the last twenty years.

Would you describe the E.U. as an entry point for U.S. financial capitalism?

Brussels seems to be having two, somewhat contradictory effects on financial capitalism: On the one hand, the E.U. has created the path for Anglo-Saxon capitalism to diffuse into the common market, especially in the realm of finance. On the other hand, the E.U. can also be quite powerful. Competition law, the regulation of state aid and the push back against BITs are examples. Here, the E.U. seems to be asserting legal sovereignty which many states have been willing to compromise.

The approach you adopt in a lot of your research is strongly influenced by questions of political economy. Why can this be a useful lens when analysing law?

Law is essentially related to the state and state power, or put differently, state power is configured as law and legal institutions. Thus, I can hardly see how you would not think about power in relation to law. The key is to understand how the law opens specific paths to use power. And as a society, we have to contemplate whether such uses of law, and by implication of state power, are legitimate, and if not, to act to rectify this.

Do you think the inequality you describe in your book is *per se* coded into the law or is it rather a question of lawmaking and who has access to and control over the kind of laws that are being made?

Legal institutions can be moulded in different ways. In this sense, you could think of law as kind of neutral. It's not ingrained in the law that the powerful always win; law is also a means for constraining power, including state and private power. However, there is an interesting interaction between the ability to code capital with the help of key legal institutions, such as property, collateral, trust, corporate, and bankruptcy law, without requiring *ex ante* approval, and private power. Private actors will push to the scope of legal privileges and try to persuade courts or regulators that a coding strategy that worked for one asset might be used for another asset as well. This is of immense economic value to them and helps deepen inequality – not only economic inequality but also legal inequality. In principle, all should be equal before the law, but the ones who have better access to superior coding strategies, or to regulators that grant exemptions from laws for some even as everyone else has to play by the rules, are more equal.

In your keynote you presented an approach of *Comparative Legal Institutionalism*. As a matter of methodology, many scholars either don't take legal comparison seriously enough or they are intimidated by its complexity. What is your view on comparative research?

Comparison is indeed a difficult task. It takes some time to immerse yourself in foreign legal systems. Studying law elsewhere is a great strategy to understand not only foreign law, but the context in which it is used. In my view, comparative analysis is a powerful methodology – at least if it is not just used for describing certain legal institutions in different systems, but for analysing the interaction between legal rules and strategic actors in different contexts.

Another methodological dimension particularly relevant for Law and Development is interdisciplinarity. Where do you see the benefits of interdisciplinary research?

In Law and Development, we ask how law relates to economic or social development, so by definition you have to look beyond black-letter-law. The real question is how far you want to venture beyond the law. This depends on the area of law. In corporate law and finance it is obviously impossible to make much headway without some basic understanding of economics and finance. In other areas, sociology may be more important, and in yet others political theory is critical.

Some lawyers have acquired statistical or formal modelling skills. This is great as long as they are used carefully. However, I believe that qualitative research, in particular well-designed case studies can go a long way for comparative legal analysis, including Law and Development. They are also more likely to lead us to the critical question of causation.

A lot of your research emanates from scenarios of legal transformation. Do you recall a specific experience which made you aware of the constitutive role of law in our current system and how law is often misconceived or underestimated by other disciplines?

I was lucky that the collapse of the Soviet Union happened just when I embarked on my academic career. Luckily, I had the chance to conduct fieldwork in Russia in 1993 about the mass privatization program. I travelled through the country and interviewed managers of recently privatized companies in Russia, trying to find out what they thought of the corporate form and how they worked with newly introduced corporate charters. The economists I worked for were only interested in the ownership structure of firms. They expected that mass privatization would create a market for shares in no time, and that this market would help allocate property rights to the most efficient users. Talking to people in the field and visiting factories taught me that much more was needed for creating a functioning market economy. In effect, this experience denaturalized markets and economic systems for me. I don't take them for granted but think about how they are created. And then I unpack them. I did this for systems that emerged from socialism; I am now doing this for capitalism.

Thomas Dollmaier is a doctoral research fellow at the Chair for Public Law and Comparative Law at Humboldt University Berlin.

Cite as: Thomas Dollmaier, "Law in Capitalism. An Interview with Katharina Pistor", *Völkerrechtsblog*, 28 October 2019.

